

→ Library

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
SUBSTANTIAL DEVELOPMENT PERMIT  
RESCINDED BY KITSAP COUNTY,

KENNETH C. LASSITER,

Appellant,

v.

KITSAP COUNTY and  
ILLAHEE BETTERMENT COMMITTEE,

Respondents.

SHB No. 86-23

ORDER OF REMAND

This matter, a request for review of the action of Kitsap County on the application for a shoreline substantial development permit of Kenneth Lassiter for floating fish pens on Port Orchard Bay in Kitsap County, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk (presiding), Wick Dufford, Nancy R. Burnett, Rodney M. Kerslake, and Robert Schofield, convened at Bremerton, Washington, on August 28, 1986.

Appellant represented himself. Respondent Illahee Betterment

1 Committee was represented by John C. Merkel of the law firm of Merkel,  
2 Caine, Jory, Donohue, and Duvall. Respondent County appeared and was  
3 represented by Scott M. Missall, Deputy Prosecuting Attorney.

4 The proceedings were reported by Cheri L. Davidson of Gene Barker  
5 and Associates. Exhibits were admitted and examined. Argument was  
6 heard.

#### 7 PROCEDURE

8 On August 22, 1986, respondent Kitsap County filed a motion to  
9 remand the matter back to Kitsap County. On August 27, 1986,  
10 appellant Lassiter filed a memorandum in opposition to the motion.

11 Without objection, this motion was argued before the Board, prior  
12 to starting the evidentiary portion of the hearing on August 28,  
13 1986. This order confirms the ruling made orally at the conclusion of  
14 argument after consideration by the Board.

#### 15 RECORD

16 Pursuant to the Pre-Hearing Order herein the parties provided to  
17 the Board copies of their documentary exhibits. Included therein were  
18 the complete files of materials considered by the County in acting on  
19 the subject substantial development permit application and the related  
20 application for a home occupation/conditional use permit under the  
21 County's zoning ordinance. (R-1-1 through R-1-79 and R-2-1 through  
22 R2-21.)

23 In preparing this decision the Board considered the County's  
24 entire record. In addition, the Board considered Exhibits R-3, R-10,  
25 R-11, R-16 through R-24 and each of appellants Exhibits: A-1 through

1 A-53. These documents are more particularly described on the exhibit  
2 lists annexed hereto as Appendix A. (There is some overlap in the  
3 lists.) Prior to arguments the admission of all documents on these  
4 exhibit lists was agreed to.

5 The Board also considered the briefs of the parties and the  
6 exhibits attached thereto. These included Exhibits A through G to  
7 Respondent's Motions for Remand, Motion Brief and Trial Brief  
8 (County); Exhibits 1 and 2 to Illahee Betterment Committee Brief re  
9 Opposition to Reinstatement of SDP #452; Exhibits 1 through 4 to  
10 Appellant's Response in Opposition to Respondent's Motions for  
11 Remand. (Again, there is some overlap in the exhibits included with  
12 the briefs and the exhibits set forth on the exhibit lists.)

#### 13 FACTS

14 We find that the following facts are uncontroverted on the record  
15 before this Board.

#### 16 I

17 Appellant Kenneth Lassiter submitted to Kitsap County an  
18 application for a shoreline substantial development permit on July 15,  
19 1985. The application described the project as: "Aquaculture:  
20 floating pens and walkway." With the application, a vicinity map  
21 showing the site and two drawings illustrating project features were  
22 submitted.

#### 23 II

24 Concurrently with the filing of the application, Lassiter  
25 submitted to the County a completed environmental checklist.

1 On this checklist all of the questions under "Water" were marked  
2 "N/A" (not applicable). These included inquiries about work to be  
3 done over or in the water, and about possible discharges of waste  
4 materials to surface waters.

5 In the section about "Animals," the measures proposed to preserve  
6 or enhance wildlife were: "Leave them alone, allow no hunting."

7 Under "Environmental Health," the question about environmental  
8 health hazards was answered, "None." The question about noise was  
9 answered, "Little or no noise."

10 Under "Aesthetics," the response asserted that no views would be  
11 altered and proposed no measures to reduce aesthetic impacts.

12 Under "Light and Glare" all questions about impacts were marked  
13 "None."

14 In the section dealing with "Recreation," the answer to the  
15 question about recreation opportunities in the area made no mention of  
16 activities in, on or under the water and said no recreation uses would  
17 be displaced. The answer to the question on proposed measures to  
18 reduce or control impacts on recreation was:

19 "Project will be educational/experimental."

20 Under "Transportation," all questions relating to impacts were  
21 answered "No" or "None."

22 III

23 Taken together the Lassiter's application and checklist reveal the  
24 physical components of his project only in the sketchiest detail and  
25 provide almost no information on the operational aspects of the

1 proposal.

2 IV

3 On August 16, 1985, the County notified adjacent property owners  
4 of a public hearing to be held on September 23, 1985, on the Lassiter  
5 application. The notice solicited either attendance or written  
6 comments.

7 V

8 On August 27, 1985, the County issued a Determination of  
9 Nonsignificance (DNS) for the Lassiter application, describing the  
10 proposal as: "Shoreline Substantial Development Permit No. 452 for  
11 placement of four net pens approximately 70' x 70'."

12 The DNS stated that no action would be taken on the proposal for  
13 fifteen days and asked for comments to be submitted by September 11,  
14 1985. Under "Comments," the DNS stated:

15 The scale of the proposal will limit adverse impacts  
16 to minor levels. The project will create a minor  
obstruction to near shore boat traffic.

17 Copies of the DNS were sent to various state agencies and the  
18 Suquamish Tribe. Arrangements were made for it to be published on  
19 September 4, 1985.

20 VI

21 No comments on the DNS were received within the 15-day comment  
22 period. Only the Suquamish Tribe provided a substantive response.  
23 The tribe did not object to the project, but pointed out a number of  
24 areas of potential impact not addressed in the DNS: predation on  
25 outmigrating chum fry by salmon held in pens; interference with

1 existing net fisheries; need for navigation markers; effects of  
2 accumulations of uneaten food and fecal material below the pens.

3 VIII

4 Prior to and immediately after the hearing on September 23, 1985,  
5 the County received letters from citizens opposing the project. These  
6 letters voiced numerous environmental concerns, including the effects  
7 of waste products from fish and excess feed both under the nets and as  
8 affected by tides; road traffic on the uplands and boat traffic to the  
9 pens; effects on predatory birds and marine mammals; fishing,  
10 navigation and recreation impacts; effects on views and compatibility  
11 of a commercial operation with the residential neighborhood.

12 Similar sentiments were expressed at the hearing itself. Also at  
13 the hearing Mr. Lassiter explained that fish would be gutted on his  
14 upland property which fronts on the proposed site of the anchored pens.

15 On September 25, 1985, Lassiter by letter provided more  
16 information to the County about his plans for harvesting, on-site  
17 processing, and sale of fish and wastes. He said that these matters  
18 would be the subject of a separate hearing on a conditional use permit.

19 VIII

20 On October 7, 1985, the County Commissioners approved the  
21 substantial development permit subject to enumerated conditions,  
22 including a requirement for obtaining home occupation/conditional use  
23 permits under the County zoning code. The County's apparent intention  
24 was to use the processing of these additional permits as the vehicle  
25

1 for reviewing the various environmental concerns which had been raised.

2 The County forwarded the permit to Lassiter and to the Department  
3 of Ecology. Subsequently on October 29, 1985, the County requested  
4 that Ecology return the permit pending consideration of the zoning  
5 issues.

6 IX

7 On December 20, 1985, Lassiter applied for home  
8 occupation/conditional use permits. Notice of hearing was made on  
9 January 29, 1986.

10 On February 3, 1986, Lassiter wrote the County outlining measures  
11 for on-site fish processing. On February 10, he wrote again stating  
12 that the home occupation/conditional use application was not for  
13 on-site processing of fish on his property.

14 The hearing, held February 13, 1986, was directed to use of the  
15 house on Lassiter's property for office and storage space in  
16 conjunction with the aquaculture project. The proposed storage was  
17 for fish feed to be transported from the house down the bank by  
18 footpath to the beach.

19 Opponents raised questions about access for delivery traffic,  
20 rodent control, aesthetics, handling of dead fish, and compatibility  
21 of the business with the residential neighborhood.

22 The hearing examiner denied the requested permits by a decision  
23 dated March 4, 1985. In the decision he found that final action on  
24 the shoreline substantial development permit had been "tabled" until a  
25 decision was made on the upland uses. He also found that under

1 Lassiter's proposal fish would not be processed on the upland portion  
2 of the property.

3 X

4 Lassiter appealed the hearing examiner's decision to the County  
5 Commissioners who held a hearing on the matter on April 7, 1986. At  
6 the hearing the same kinds of environmental concerns as expressed in  
7 earlier proceedings were raised. On May 12, 1986, the Commissioners  
8 denied Lassiter's appeal, adopted the findings of the hearing examiner  
9 and rescinded the substantial development permit for failure to  
10 satisfy the requirement to obtain home occupation/conditional use  
11 permits.

12 At no point in the entire process did the County ever purport to  
13 reconsider the DNS issued on August 27, 1985.

14 Lassiter's appeal to this Board was filed on May 28, 1986.

15 XI

16 On the record, neither the physical nor the operational features  
17 of Lassiter's project have been completely disclosed. An example of  
18 the former is the lack of reviewable plans for the anchoring system to  
19 be used for the pens. The effects of tidal action and storms, the  
20 impacts on navigation and other uses cannot be evaluated absent such  
21 information.

22 For an example of the latter, no clear idea of how fish processing  
23 is to be carried out has been provided. The very nature of the  
24 rearing project necessarily presupposes the killing and processing of  
25 fish at some location, whether on appellant's property or not. The  
26 impacts of such activity cannot be evaluated without knowing where and  
27 how it will be done.



1 XII

2 Since the issuance of the DNS in this matter, the County has  
3 become aware of a growing body of scientific literature and expert  
4 opinion expressing concerns about the environmental effects of fish  
5 farming using floating pens. Potential water quality problems are  
6 suggested by the comparison of fish pens to feedlots. Possible health  
7 impacts on both marine life and humans are presented by the  
8 introduction of antibiotics from fish food into the water.

9 CONCLUSIONS

10 We have decided to grant the County's motion to remand and do so  
11 on the basis of the following legal conclusions.

12 I

13 The permit system of the Shoreline Management Act is inextricably  
14 interrelated with and supplemented by the requirements of the State  
15 Environmental Policy Act (SEPA), chapter 43.21C RCW. Sisley v. San  
16 Juan County, 89 Wn. 2d 78, 569 P.2d 712 (1977). The Board's function  
17 includes review of compliance with the requirements of SEPA.

18 II

19 Compliance with the procedural requirements of SEPA is a  
20 statutorily mandated function imposed on the lead permitting agency  
21 for a project, here Kitsap County. Juanita Bay Valley Community  
22 Association v. Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (1973); WAC  
23 197-11-050.

24 III

25 This Board conducts de novo review of decisions brought before it

1 on an independent record and may approve or condition the approval of  
2 substantial development permits. San Juan County v. Department of  
3 Natural Resources, 28 Wn. App. 796, 626 P. 2d 995 (1981).

4 However, as a quasi judicial body, the Board does not itself  
5 perform procedural functions, statutorily assigned to the entities it  
6 reviews. See WAC 197-11-800 (12)(b). Therefore, the Board's review  
7 of SEPA procedural compliance involves the possibility of a remand to  
8 the entity which should perform the procedures.

9 Such review is appropriate even where, as here, the decision  
10 reviewed was essentially to deny a permit. Otherwise, this Board's  
11 approval of the permit on review could mean approval of a project  
12 without the mandates of SEPA ever having been complied with.

#### 13 IV

14 The threshold decision under SEPA is whether or not an  
15 environmental impact statement must be prepared. WAC 197-11-797. For  
16 this decision to be made properly, the agency must possess  
17 "information reasonably sufficient to evaluate the environmental  
18 impact of a proposal." WAC 197-11-335.

#### 19 V

20 To meet the "reasonably sufficient" information requirement, a  
21 project must be defined with enough detail that its likely effects can  
22 be ascertained. See WAC 197-11-060(3). The effects include direct,  
23 indirect and cumulative (or precedential) impacts. See WAC 197-11-792.

24 We conclude that the Lassiter project has not been properly  
25

1 defined as contemplated by the SEPA regulations and that, as a result,  
2 the threshold determination was not based on information "reasonably  
3 sufficient" to evaluate its environmental impacts. The incompleteness  
4 and inaccuracy of the responses to the environmental checklist provide  
5 an additional basis for this conclusion. See Whittle v. Westport, SHB  
6 No. 81-10 (Aug. 4, 1981).

## 7 VI

8 We also conclude that, as a matter of law, the County failed to  
9 comply with WAC 197-11-340(3). That subsection reads:

10 (3)(a) The lead agency shall withdraw a DNS if:  
11 (i) there are substantial changes to a proposal so  
12 that the proposal is likely to have significant  
13 adverse environmental impacts;  
14 (ii) There is significant new information indicating,  
15 or on, a proposal's probable significant adverse  
16 environmental impacts; or  
17 (iii) The DNS was procured by misrepresentation or  
18 lack of material disclosure; if such DNS resulted  
19 from the actions of an applicant, any subsequent  
20 environmental checklist on the proposal shall be  
21 prepared directly by the lead agency or its  
22 consultant at the expense of the applicant.  
(b) Subsection (3)(a)(i) shall not apply when a  
nonexempt license has been issued on a private  
project.  
(c) If the lead agency withdraws a DNS, the agency  
shall make a new threshold determination and notify  
other agencies with jurisdiction of the withdrawal  
and new threshold determination. If a DS is issued,  
each agency with jurisdiction shall commence action  
to suspend, modify, or revoke any approvals until the  
necessary environmental review has occurred (see also  
197-11-070).

23 Withdrawal of a DNS is mandatory when any of the subheadings of  
24 subsection (a) apply.

25 For the purposes of the regulation, we hold that the permit in  
26 ORDER OF REMAND  
27 SHB No. 86-23

1 question was never issued. Under the circumstances, the DNS should  
2 have been withdrawn because of significant new information on probable  
3 significant adverse impacts.

4 Moreover, we decide that the DNS was procured by both  
5 misrepresentation and lack of material disclosure. In this situation,  
6 failure to withdraw the DNS constituted legal error.

## 7 VII

8 The matter should be remanded to the County for consideration of  
9 the threshold determination in light of an adequate definition of the  
10 project, correct and complete responses to the environmental checklist  
11 and new information on likely impacts.

12 In reaching this decision, we do not reach the issue of what the  
13 threshold decision, when properly made, ought to be. The substantive  
14 factual question of whether there is a "reasonable probability of a  
15 more than moderate effect on the quality of the environment," ASARCO  
16 v. Air Quality Coalition, 92 Wn. 2d 685, 601 P. 2d 501 (1979), is for  
17 the County to answer on remand. We decide only that this question  
18 must be answered on the basis of more information.

ORDER

The matter is remanded to Kitsap County for reconsideration consistent with the foregoing decision.

This is a final determination of this action. Any proceedings which may arise from any future action of the County on the project shall constitute a new and separate case before this Board.

DONE this 26<sup>th</sup> day of October, 1986.

SHORELINES HEARINGS BOARD

 10/27/86  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Lawyer Member

  
NANCY R. BURNETT, Member

  
RODNEY M. KERSLAKE, Member

Not Available for Signature  
ROBERT SCHOFIELD, Member